PUBLIC VERSION

SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

AMERICA • ASIA PACIFIC • EUROPE

JBENDERNAGEL@SIDLEY.COM
+1 202 736 8136

August 28, 2017

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***AT&T Corp. v. Iowa Network Services, Inc.*, Proceeding Number No. 17-56; File No. EB-17-MD-001**

Dear Ms. Dortch:

AT&T Corp. ("AT&T") submits for filing the **Public Version** of its Final Reply Brief in the above-referenced proceeding. Consistent with the Commission's rules and the February 24, 2017, Protective Order entered by the Commission Staff, AT&T has redacted all highly confidential information from the **Public Version**, which it is filing by ECFS.

AT&T is also filing by hand with the Secretary's office hard copies of the **Highly Confidential Version** of this submission. In addition, copies of all versions of the submission are being served electronically on INS's counsel. Electronic courtesy copies, as well as three courtesy hard copies of the Highly Confidential Version, are also being provided to the Commission's Enforcement Bureau.

Please contact me if you have any questions regarding this matter.

Sincerely,

James F. Bendernagel

Enclosures

SIDLEY

cc: James L. Troup, Counsel for Defendant
Tony Lee, Counsel for Defendant
Lisa Griffin, FCC
Anthony DeLaurentis, FCC
Christopher Killion, FCC

Final Reply Brief of AT&T Corp.

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **AT&T CORP.** **One AT&T Way** **Bedminster, NJ 07921** **(303) 299-5708** ***Complainant,*** ***v.*** **IOWA NETWORK SERVICES, INC.** **d/b/a Aureon Network Services** **7760 Office Plaza Drive South** **West Des Moines, IA 50266** **(515) 830-0110** ***Defendant.***	**Proceeding Number 17-56** **File No. EB-17-MD-001**

FINAL REPLY BRIEF OF AT&T CORP.

Letty Friesen
AT&T SERVICES, INC
161 Inverness Drive West
Englewood, CO 80112
(303) 299-5708
(281) 664-9858 (fax)

James F. Bendernagel, Jr.
Michael J. Hunseder
Spencer Driscoll
Morgan Lindsay
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
jbendernagel@sidley.com
mhunseder@sidley.com
(202) 736-8000
(202) 736-8711 (fax)

Brian A. McAleenan
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
(312) 853-7036 (fax)

August 28, 2017

Counsel for AT&T Corp.

PUBLIC VERSION

AT&T Corp. ("AT&T") hereby submits this Reply Brief in support of its Formal Complaint against Iowa Network Services d/b/a Aureon Network Services ("INS").[1]

INTRODUCTION

In its Final Brief, INS first asserts that AT&T violated § 201 of the Communications Act by failing to pay certain "undisputed amounts" in INS's invoices. As shown below, that claim is procedurally barred. Further, INS's claim lacks substantive merit. Because INS filed an unlawful tariff that exceeded the Commission's rate cap and rate parity rules, all of INS's charges to AT&T were improperly billed. AT&T was thus under no obligation to pay any of the amounts at issue, because INS lacked a lawful or applicable tariff. AT&T nevertheless made good faith payments to INS, based on AT&T's estimates of what INS could have billed for its legitimate, ordinary Centralized Equal Access ("CEA") traffic to carriers not engaged in access stimulation. The "undisputed" amounts that INS claims should also have been paid are in fact disputed by AT&T and, in any event, are only a very small fraction of the disputed bills. In paying more than what is disputed, AT&T did not act unlawfully or unreasonably.

INS's Final Brief also makes two arguments purportedly supporting its rates and accounting practices: (1) that the lease rates purportedly charged to the Access Division were reasonable and (2) that its inclusion of so-called "Uncollectible Revenues" in the Access Division's revenue requirement was compliant with the Commission's rules. Neither argument is soundly based.

[1] Consistent with Staff's Orders, AT&T's Reply addresses only the issues raised in INS's Final Brief; AT&T is not waiving or abandoning any claim or argument set forth in its Complaint, Reply and Final Brief (and supporting material), even if not explicitly addressed here.

ARGUMENT

A. AT&T Lawfully Withheld Payments from INS.

INS's claim that AT&T violated § 201 of the Act by allegedly failing to pay the "undisputed" amounts of some of INS's prior bills for access is flawed procedurally and substantively.[2]

Procedurally, INS's claim is defective because the Commission lacks jurisdiction over a carrier's claims for failure to pay billed access charges. *See, e.g., All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 15016 (2011). Additionally, even if the Commission had jurisdiction over such claims, INS could not properly raise them in this case, because the Commission's rules "expressly prohibit[]" INS from raising counterclaims. 47 C.F.R. § 1.725. In this regard, INS neither raised a Communications Act claim in the District Court litigation, nor sought to file its own complaint as part of the referral. Thus, INS's request that the Commission address this argument "[i]n order to provide the full guidance sought by the federal district court" (INS Final Br. at 4) is meritless. For these reasons, INS's claim is barred on procedural grounds.

INS's claim is also substantively lacking in merit for several reasons. *First*, INS has not properly billed AT&T for any of the traffic at issue, including the originating traffic routed from CLECs engaged in access stimulation. *See* AT&T Compl. § III (discussing INS's violation of the Commission's rate cap and rate parity rules).[3] The rates in INS's CEA tariff exceed the Commission's rate cap and rate parity rules; therefore, INS's bills were based on a tariff that was patently void. *See Global NAPS, Inc. v. FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001); *Capital*

[2] To the extent INS raises a claim under § 201(a), that claim is flawed for the reasons identified below, and because, as AT&T has already explained, the Commission never ordered a "through route" under § 201(a). *See* AT&T Legal Analysis, Part I.C.2.

[3] Further, as AT&T has explained, INS is engaged in access stimulation, and should have re-filed its tariffs as required by those rules to lower its INS's rates. *See* AT&T Compl. § IV.

Network Sys., Inc. v. FCC, 28 F.3d 201, 204-06 (D.C. Cir. 1994). Accordingly, INS's bills were improper in full, and INS had no right to collect from AT&T for any bills issued under that tariff. *See Security Servs., Inc. v. K Mart Corp.*, 511 U.S. 431, 444 (1994) (carriers may not collect fees "based on filed, but void, rates").

Second, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

Finally, INS's reliance on *CenturyTel of Chatham, LLC v. Sprint Communications Co.*, 861 F.3d 566 (5th Cir. 2017), is misplaced. In that case, Sprint disputed CenturyLink's billing for certain VoIP-originated calls, and it accordingly withheld payment—claiming that the IP services provided by CenturyLink were not subject to CenturyLink's access tariff. *See id*. at 569. But Sprint took action beyond withholding; it "clawed back" amounts for its prior "overpayments" by withholding payment for other traffic that CenturyLink had lawfully billed. *See id*. at 569-70. The Fifth Circuit concluded that Sprint's claw-back efforts were an unreasonable practice in violation of § 201(b) of the Act.[5] As set forth above and in AT&T's Complaint, nothing comparable happened here. In contrast to the situation in *CenturyTel*, INS never properly billed AT&T for CEA service. Consequently, the holding in *CenturyTel* is inapposite. Further, because AT&T would have been justified in paying INS nothing, there are no undisputed amounts.[6] In fact, AT&T is seeking refunds from INS for the period prior to late 2013, and is entitled to damages because AT&T *did not* "claw back" amounts that INS had

[4] AT&T contests INS's claim (INS Final Br. at 2-3) that AT&T owes any amounts with respect to access stimulation traffic. Because INS's CEA tariff is not applicable to such traffic (*see* AT&T Legal Analysis, Part III), there are no "undisputed amounts" relating to that traffic.

[5] AT&T does not necessarily agree that the Fifth Circuit's holding is correct, and the Commission itself has not held that the customer conduct described in that opinion violates the Communications Act (as opposed to the tariff). Indeed, the district court's decision at issue in *CenturyTel* relied on Commission precedent that has been overruled. However, the Commission need not reach the issue here because the facts are plainly different in this case.

[6] Given INS's unlawful conduct, AT&T would have been justified in withholding all amounts billed by INS. However, it did not so. Instead, AT&T has made a good faith effort to pay INS (at the capped rate) for legitimate CEA traffic. *See* Habiak Initial Decl. ¶¶ 43-53.

previously billed improperly. Instead, AT&T elected to seek refunds via its counterclaims in District Court (and now at the Commission).

B. INS's IXC Division Lease Rates Charged to its Access Division Are Unreasonable.

To justify the reasonableness of its belatedly disclosed lease rates, INS argues that those rates are consistent with the Commission's rules requiring that services provided "to a carrier by an affiliate … be recorded at no more than the lower of fair market value and fully distributed cost." *See* INS Final Br. at 5. As proof that it has complied with that rule, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted]

[redacted]

[[END HIGHLY CONFIDENTIAL]] At bottom, the NECA-based reasonableness test is a failed attempt at post-hoc rationalization for INS's unreasonable and overstated CEA rates.

C. INS's Decision To Include Purported "Uncollectible Revenue" in the Revenue Requirement is Improper and Unreasonably Inflates the CEA Rates.

INS's final argument is that GAAP principles and the Commission's accounting rules permit the inclusion of so-called "Uncollectible Revenues" in the Access Division's revenue requirement. *See* INS Final Br. at 11-14. INS raises this issue in its Final Brief under the guise that there was something new in discovery warranting its inclusion, when in fact nothing in the recent discovery relates to this issue.[7] Moreover, as demonstrated below, INS's generalized argument with respect to the applicability of accounting principles entirely fails to address the realities of INS's own improper practices with respect to the inclusion of uncollectibles.

As AT&T previously demonstrated, INS's inclusion of so-called "Uncollectible Revenue" in the Access Division's revenue requirement is improper and has artificially inflated INS's CEA rates. *See* AT&T Legal Analysis, at 61-62; Rhinehart Initial Decl. ¶¶ 41-42, Table J. AT&T further explained that the Commission's rules prohibited this inclusion because the amounts at issue were not properly billed. *See* AT&T Legal Analysis at 61-62; AT&T Reply

[7] The documents cited by INS in support of its new arguments were not a part of its August 7 production, nor was the "Uncollectible Revenue" issue identified in the parties' responses to the Staff's August 9, 2017 inquiry regarding the need for additional briefing. *See* AT&T Statement, dated August 10, 2017; INS Letter, dated August 10, 2017. Consequently, INS could have and should have made these arguments as part of its answering submission, but it chose not to do so.

Legal Analysis at 57. INS's practice in this regard also raises serious issues of ratepayer fairness because the potential beneficiaries of future reductions in the Access Division's revenue requirement will not be the same group of ratepayers that bore the burden of the inclusion of the "Uncollectible Revenues." *See* AT&T Reply Legal Analysis at 57; Rhinehart Reply Decl. ¶¶ 55-56.

In its Final Brief, INS addresses none of these concerns. Instead, it tries to explain away its **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** by arguing that the "Allowance" method of accounting for doubtful accounts permits inclusion of "uncollectibles" in a carrier's revenue requirement even if they have not been written off. INS also cites FCC orders for the general proposition that "[t]he Commission's ratemaking policies 'account for interstate uncollectibles and provide for their recovery through interstate access charges.'"[8] INS's arguments miss the mark for several reasons.

First, AT&T has not taken the position (as INS implies) that uncollectibles may never be included in a carrier's revenue requirement. Indeed, AT&T agrees that the Commission's rules permit (in appropriate circumstances) accounting for "doubtful" accounts that are "impracticable of collection." *See* INS Final Brief at 13 (quoting 47 C.F.R. § 32.1171). But in this case, the *specific amounts at issue* do not qualify for such treatment because they are not, in fact, "uncollectible"— they are neither doubtful nor impracticable of collection. Both AT&T and Sprint can pay should INS prevail. Further, INS has steadfastly maintained that the amounts at

[8] *See* INS Final Brief at 13 (quoting *Nat'l Exch. Carrier Ass'n*, Order, 17 FCC Rcd. 22595, ¶ 3 (Nov. 8, 2002); *Madison River Tel. Co., LLC*, Order, 17 FCC Rcd. 23929, ¶ 3 (Nov. 25, 2002); *Iowa Telecomms. Servs., Inc.*, Order, 17 FCC Rcd. 17246, ¶ 3 (Sept. 18, 2002)).

issue were properly billed, strongly suggesting that INS believed it would be paid.[9] Thus, they are not appropriate for inclusion in the Access Division's revenue requirement.

Second, the FCC orders on which INS relies undermine its position. In each case, the Commission suspended the carrier's proposed tariff revisions to investigate the questionable practice of including unsubstantiated "uncollectibles" in the revenue requirement.[10] Further, in each investigation, the Commission required the carrier to produce records and studies to verify its practices,[11] which caused the carriers to withdraw their proposed tariffs.[12]

Finally, the effect of INS's inclusion of the amounts at issue in the Access Division's revenue requirement (*i.e.*, the recovery of these amounts from future ratepayers) stands at odds with the purpose of the "Allowance" method. Rather than align the potential loss with the related revenue stream, INS's approach does the opposite by creating a new revenue stream wherein INS may recover from future ratepayers the same amounts that it seeks from AT&T and Sprint through litigation. This practice artificially inflates INS's CEA rates and creates the potential for over-recovery from ratepayers. Because INS's tariff allows AT&T and Sprint to

---

[9] The opposite conclusion (i.e., AT&T and Sprint have a high probability of prevailing), also does not support INS's position. To the contrary, such an outcome would mean that INS never had a right to bill or collect the amounts in the first place, in which case it clearly would be improper to include them in the Access Division's revenue requirement.

[10] *See Nat'l Exch. Carrier Ass'n*, 17 FCC Rcd. 16903, ¶ 3 (2002) (investigating "whether NECA has provided sufficient cost support for its proposed increase [in uncollectibles]" and whether NECA was engaged in "impermissible retroactive ratemaking"); *Madison River Tel. Co.* 17 FCC Rcd. 19693, ¶ 3 (2002) (investigating whether Madison River had "justified an increase in uncollectibles by any rationally anticipated risk of uncollectible revenue from access customers"); *see also Iowa Telecomms. Servs.*,17 FCC Rcd. 13804, ¶ 2 (2002).

[11] *See Nat'l Exch. Carrier Ass'n*, 17 FCC Rcd. 22595, ¶ 9 (2002) (requiring NECA to provide carrier default records sufficient to justify an increased amount of uncollectibles, as well as proof of the purported increased risk of carrier default); *Madison River Tel. Co.*, 17 FCC Rcd. 23929, ¶ 7 (2002) (same); *Iowa Telecomms. Servs.* 17 FCC Rcd. 17246, ¶ 9 (2002) (ordering the carrier to submit records of its actual "uncollectible debts from interstate access services for the years since its inception to the present . . . .").

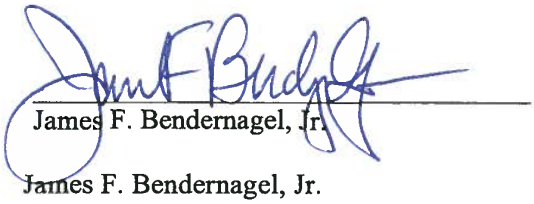
[12] *See Nat'l Exch. Carrier Ass'n*, 18 FCC Rcd. 2381, ¶ 1 (2003); *Madison River Tel. Co.*, 18 FCC Rcd. 4184, ¶ 2 (2003); *Iowa Telecomms. Servs.*, 17 FCC Rcd. 26081, ¶ 1 (2002).

withhold disputed amounts and permits INS to recover substantial late payment penalties should it prevail (*see* AT&T Ex. 3, INAD Tariff FCC No. 1 § 2.4.1(B)(2)(c)), the Commission should not permit INS to effectively create an additional remedy (and potential windfall recoveries of the same rates).

CONCLUSION

For the reasons set forth above, as well as in AT&T's other pleadings, the Commission should reject INS's affirmative defenses and grant the relief that AT&T has requested in its Formal Complaint.

Respectfully submitted,



James F. Bendernagel, Jr.

Letty Friesen
AT&T SERVICES, INC
161 Inverness Drive West
Englewood, CO 80112
(303) 299-5708
(281) 664-9858 (fax)

James F. Bendernagel, Jr.
Michael J. Hunseder
Spencer Driscoll
Morgan Lindsay
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
jbendernagel@sidley.com
mhunseder@sidley.com
(202) 736-8000
(202) 736-8711 (fax)

Brian A. McAleenan
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
(312) 853-7036 (fax)

Dated: August 28, 2017

Counsel for AT&T Corp.

CERTIFICATE OF SERVICE

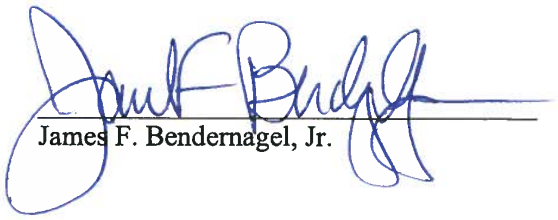
I hereby certify that on August 28, 2017, I caused a copy of the foregoing Final Reply Brief of AT&T Corp. to be served as indicated below to the following:

Marlene H. Dortch
Office of the Secretary
Market Disputes and Resolution Division
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
(Original of the Highly Confidential Version via Hand Delivery)

Lisa Griffin
Anthony DeLaurentis
Sandra Gray-Fields
Christopher Killion
Enforcement Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
(One Copy of the Public Version and Highly Confidential Version via E-mail; Three Courtesy Hard Copies of the Highly Confidential Version via Hand Delivery)

James U. Troup
Tony S. Lee
Fletcher, Heald & Hildreth
1300 North 17th Street
Suite 1100
Arlington, VA 22209
troup@fhhlaw.com
lee@fhhlaw.com
(One Copy of the Public Version and Highly Confidential Version via E-mail)

Respectfully submitted,



James F. Bendernagel, Jr.

Supplemental Declaration of John W. Habiak

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
202-457-3090

Complainant,

Proceeding No. 17-56
File No. 17 - MB - 001

v.

IOWA NETWORK SERVICES, INC.
7760 Office Plaza South
West Des Moines, Iowa 50266
(515) 830-0110

Defendant.

SUPPLMENTAL DECLARATION OF JOHN W. HABIAK

I, John W. Habiak, of full age, hereby declare and certify as follows:

1. I am employed by Complainant AT&T Corp. ("AT&T"). I submitted a prior Declaration in support of AT&T's Formal Complaint, in which I described my employment, responsibilities, and knowledge regarding certain issues relevant to this proceeding.

2. I submit this Supplemental Declaration to address certain assertions that Iowa Network Services, d/b/a Aureon ("INS") made in its Initial Brief (dated August 21, 2017) and supporting documentation concerning AT&T's withholding of payment for originating access charges on bills issued by INS.

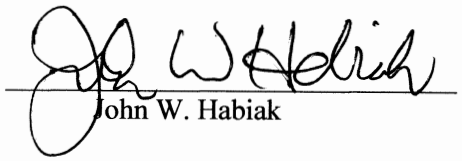
3. As AT&T has stated previously in this proceeding, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted]

[[END HIGHLY CONFIDENTIAL]]

CERTIFICATION

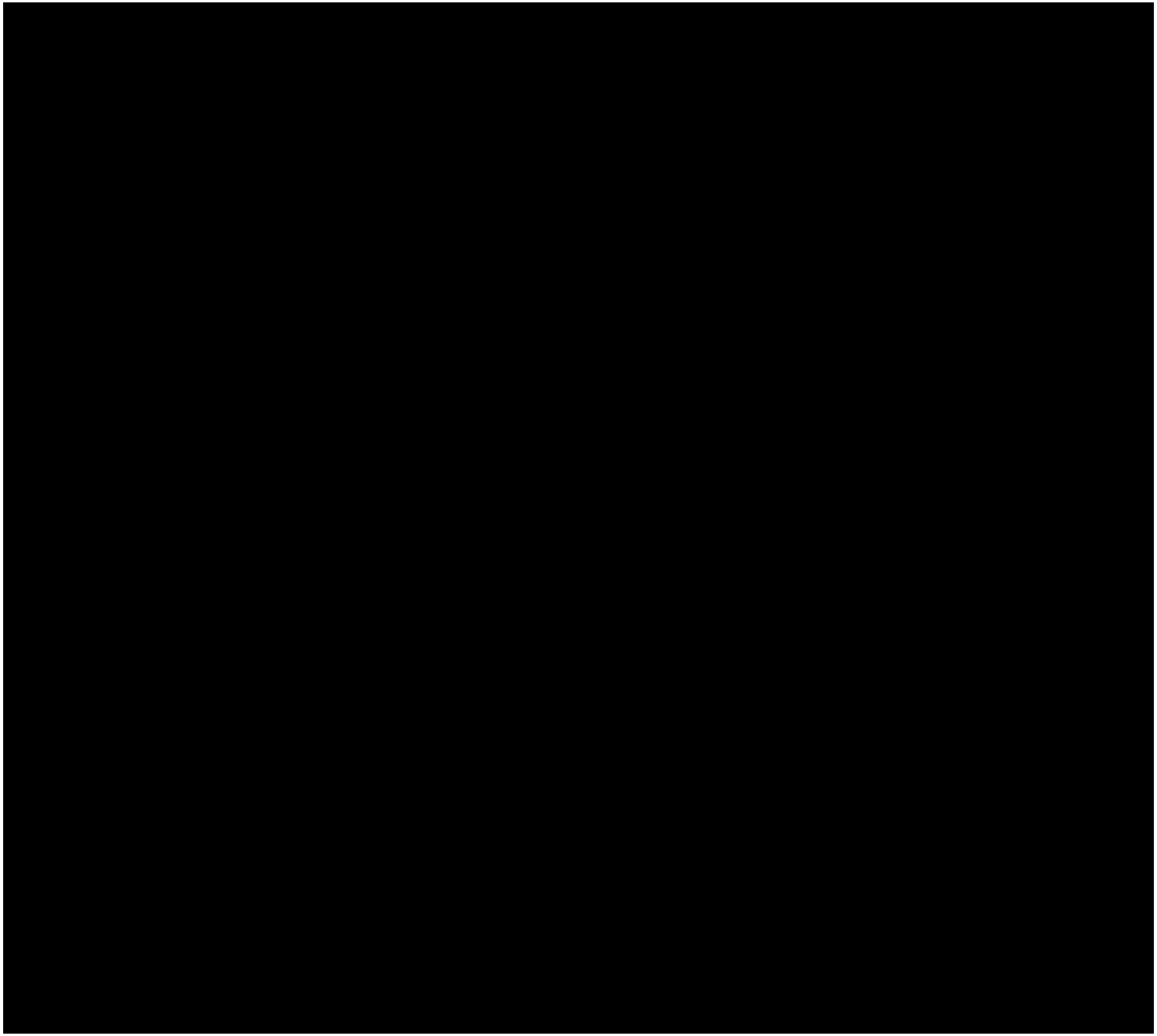
I certify under penalty of perjury that the foregoing is true and correct. Executed on August 25, 2017.



John W. Habiak

Exhibit A

[[BEGIN HIGHLY CONFIDENTIAL]]



[[END HIGHLY CONFIDENTIAL]]